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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

AFFORDABLE HOUSING COALITION OF
SAN DIEGO COUNTY, et al.

Plaintiffs and Appellants,

v.

CITY OF SAN DIEGO,

Defendant and Respondent.

D054991

(Super. Ct. No. 37-2007-00083592-
CU-TT-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Linda B. Quinn, Judge. Affirmed.

In December 2007, the San Diego City Council approved the Tourism Marketing District (TMD), which established a 2 percent tax on existing hotel rooms. Revenues collected from the tax are to be used to fund tourism marketing programs within the TMD. Affordable Housing Coalition of San Diego County and Citizens for Responsible Equitable Environmental Development (collectively, Coalition) filed a petition for writ of mandate, alleging that the City of San Diego (City) failed to comply with the California Environmental

Quality Act (CEQA) when it approved the TMD. The trial court rejected the Coalition's argument and denied the petition. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

After adopting an enabling procedural ordinance, the San Diego City Council approved the TMD in an effort to improve tourism activity and hotel room consumption. The TMD assesses a 2 percent tax on hotels with 70 or more already existing hotel rooms within the TMD. The boundaries of the TMD include all areas within the city limits of San Diego. The marketing programs supported by the tax are designed to promote the City as a "tourist, meeting, convention and special event destination." The revenue seeks to provide stable funding for tourism promotion and cannot be diverted to other government programs or expenditures. When approving the TMD, the City Council declared that its activities were exempt from CEQA under California Code of Regulations, title 14, section 15060(c)(3) (the activity is not a project as defined in § 15738.) (CEQA Guidelines.)

Approximately one year prior to approval of the TMD, the City prepared a final environmental impact report (FEIR) that addressed the environmental effects of the proposed San Diego Downtown Community Plan, Centre City Planned District Ordinance, and amendments to the Redevelopment Plan for the Centre City Redevelopment Project. Specifically, the FEIR reviewed updates to the 1992 Centre City Community Plan and proposed modifications to the Redevelopment Plan, Community Plan and Planned District Ordinance which governed the development of downtown San Diego. The report specifically addressed factors affecting the environment in the downtown area and surrounding neighborhoods, such as transportation, public services, air quality, water quality

and hydrology, hazardous materials, population, and energy. The FEIR stated that secondary studies would be prepared for each subsequent development to determine if the FEIR adequately addressed the potential environmental impacts.

In denying the Coalition's petition for writ of mandate, the trial court determined that the TMD was a funding mechanism not a "project," and therefore exempt from environmental review. It also found that the TMD would not significantly impact the environment beyond what had already been deemed acceptable. The Coalition appealed.

DISCUSSION

I. *Applicable Law*

The sole issue on appeal is whether the TMD is a "project" subject to environmental review under CEQA.

A. Standard of Review

Judicial review of agency action on grounds of lack of compliance with CEQA is limited to the question whether there was a prejudicial abuse of discretion. (Pub. Res. Code, § 21168.5.) "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (*Ibid.*) However, what constitutes a "project" for the purposes of CEQA review "is an issue of law which can be decided on undisputed data in the record on appeal,' and thus presents no question of deference to agency discretion or review of substantiality of evidence.

[Citation.]" (*Kaufman & Broad-South Bay Inc. v. Morgan Hill Unified School Dist.* (1992) 9 Cal.App.4th 464, 470 (*Kaufman*).)

B. What Constitutes a "Project" Under CEQA

Generally, CEQA requires the preparation of an environmental impact report (EIR) for any "project" an agency intends to approve or carry out which may have a significant effect on the environment. (Pub. Resources Code, § 21080, subd. (d); CEQA Guidelines, § 15064, subd. (a)(1).) A "project" is "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment" (Pub. Resources Code, § 21065; CEQA Guidelines, § 15378.)

Some government activities are not "projects" and therefore do not require preparation of an EIR. As relevant here, the term "project" does not include "the creation of government funding mechanisms or other government fiscal activities, which do not involve any commitment to any specific project which may result in a potentially significant physical impact on the environment." (CEQA Guidelines, § 15378, subd. (b)(4).) A significant impact on the environment is defined as "a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance." (CEQA Guidelines, § 15382.)

New government action which results in no significant change in the environmental impact does not convert that activity into a new project requiring that environmental review begin anew under CEQA. (*Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1055 (*Moss*) [expiration of tentative map did not convert subdivision into a new project for purposes of CEQA review]; *Not About Water Com. v. Board of Supervisors* (2002) 95 Cal.App.4th 982, 1001-1002 (*Not About Water*) [an assessment district formed after

establishment of a water district was not a project under CEQA], disapproved on another ground in *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 450.)

II. *The TMD is Not a "Project" Subject to Environmental Review*

A. The TMD is a Funding Mechanism

The Coalition argues that the TMD is a "project" because it commits funds to tourism. We reject that argument. Tourism is the "business of attracting tourists and providing for their accommodation and entertainment." (II The New Shorter Oxford English Dict. (Thumb Index ed. 1993) p. 3350.) The Coalition's use of the term "tourism" in this broad context does not make the TMD a "project" subject to environmental review.

Attracting tourists and providing for their accommodation does not commit funds to a specific project nor commit the City to construction of any new development. In *Kaufman, supra*, 9 Cal.App.4th 464, the court held that the formation of a community facilities district for the purpose of securing funds to acquire land, construct schools and to obtain portable classrooms for unspecified future projects was not a "project" subject to environmental review. (*Id.* at p. 476.) The court noted that although recent residential development had increased the student population, the school district was not committed to any specific course of action that included new construction. (*Id.* at pp. 469, 476.) The case before us is a variation of the same theme. Here, the City approved a method of securing marketing funds to attract tourists to already established businesses where the level of tourism had been economically planned for but had not achieved its potential. Hotels and other tourist

attractions have already been developed in the TMD. There is no evidence to show that the City has plans for new construction to support increased tourism as a result of the TMD.

Both parties agree that environmental review is not required for an activity that provides funding for existing projects. Because each hotel in the TMD is or was a project itself, the TMD is simply a mechanism to increase patronage of those hotels. The TMD creates geographical perimeters which justify the economic benefits conferred, that is, increased patronage from the marketing efforts, and the imposition of a corresponding tax burden on the existing hotels. (See, *Not About Water, supra*, 95 Cal.App.4th at p. 1002.) Because the TMD provides funding to promote already existing hotels and tourist attractions and does not commit funds to a specific new project, it is not a "project" within the meaning of CEQA.

The Coalition relies on *County of Amador v. City of Plymouth* (2007) 149 Cal.App.4th 1089, to support its argument that the TMD directs funds to a specific project. In that case, the court examined a municipal service agreement between a Native American tribe and a city to determine whether it was exempt from CEQA. (*Id.* at pp. 1093-1094.) The court determined that the action was not a government funding mechanism because the city agreed to remodel a fire station, improve infrastructure for the sewer system, and vacate a public road as part of the deal. (*Id.* at pp. 1111-1112.) Here, the Coalition fails to show that the TMD involves development of any kind. Since the TMD does not result in new development and is a method of funding marketing efforts for existing businesses within the TMD, it is a funding mechanism exempt from environmental review.

B. The TMD Has No Significant Impact on the Environment

The Coalition asserts that the TMD has the potential to have a significant impact on the environment and the City provided no environmental document that examined the impact of the TMD itself. The City responds that the TMD was established under the Parking and Business Improvement Area Law of 1989 (Sts. & Hy. Code, § 36500 et seq.), which acknowledges the need for special assessment districts to fund improvements and activities for the benefit of the businesses within the districts. (Sts. & Hy. Code, §§ 36501, 36502.) It contends that these marketing activities do not create a burden on the environment beyond what has already been considered either in the General Plan, the FEIR for the San Diego Downtown Community Plan or the individual EIRs that were required for the development of each hotel and business in the district. Moreover, the businesses within the TMD could advertise in an attempt to increase patronage without the TMD.

We agree with the City that the causal link between the approval of the TMD and the "potential" significant environmental impact is missing. (See *Kaufman, supra*, 9 Cal.App.4th at p. 474.) The record shows that the FEIR for the San Diego Downtown Community Plan addressed environmental impacts for the downtown area and surrounding neighborhoods such as transportation, public services, air quality, water quality and hydrology, hazardous materials, population, and energy. The City could and did rely on the earlier FEIR for the San Diego Downtown Community Plan in approving the TMD. The City's approval of the TMD does not turn into a new "project" under these conditions because it does not result in a significant change in the environmental impact of tourist activities already planned for by the City. (*Moss, supra*, 162 Cal.App.4th at pp. 1055-1056.)

Because the undisputed record shows that the TMD is a funding mechanism that will not increase the environmental impact over that already deemed acceptable under the earlier FEIR and environmental reviews of existing projects, the TMD is not a "project" as a matter of law. (*Kaufman, supra*, 9 Cal.App.4th at p. 470.) Accordingly, we conclude the City did not abuse its discretion in determining that environmental review was not required under CEQA, nor did the trial court err in upholding that decision.

DISPOSITION

The judgment is affirmed. The City shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

McINTYRE, J.

WE CONCUR:

NARES, Acting P. J.

HALLER, J.